In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 576

THERON C. LAND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, MISSISSIPPI, AND STATE OF MISSISSIPPI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A13-A16) is reported at 321 F. 2d 26. The judgment and order of civil contempt is printed in Appendix B of the petition.

JURISDICTION

The orders of the court of appeals were entered on July 15, 1963 (Pet. A3, A12), and rehearing was denied on August 7, 1963 (Pet. A17, A18). The petition for a writ of certiorari was filed on October 23, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction of an appeal from a district court's refusal to act on an application for a preliminary injunction.

2. Whether the individual petitioner was properly held in civil contempt of the court of appeals' injunction.

STATEMENT

On July 6, 1961, the United States filed an action in the United States District Court for the Southern District of Mississippi under the Civil Rights Acts of 1957 and 1960 (42 U.S.C. 1971), alleging that petitioners had engaged in racially discriminatory acts and practices which deprived Negro citizens in Forrest County of their right to register and to vote without distinction of race or color; that such deprivations were and are pursuant to a pattern and practice; and that, unless restrained, petitioners would continue to engage in their racially discriminatory conduct. The prayer was for preliminary and permanent injunctions (R. 2, 249).

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[1] "R." refers to the Transcript of Record filed with the court of appeals.

It was charged specifically that petitioners applied different and more stringent standards to Negroes than to white persons in determining their qualifications to vote; that they refused to afford Negroes an opportunity to register equal to that afforded white persons; that they unreasonably delayed the receipt of Negro applications; and that they arbitrarily refused to give Negroes an opportunity to apply for registration.

After lengthy procedural delays, the motion for a preliminary injunction was heard on March 5-7, 1962 (R. 524). The court refused either to grant or to deny the motion (R. 1195-1196) and the government appealed (R. 1216). On April 10 and April 16, 1962, the court of appeals issued an injunction pending appeal and ordered petitioner Lynd to cease specifically designated practices of racial discrimination in connection with Negro applicants for registration. *United States* v. *Lynd*, 301 F. 2d 818 (Pet. 6). This Court denied certiorari, 371 U.S. 893, No. 355, Oct. Term, 1962.

When Lynd failed to comply with the interlocutory orders of the court of appeals, the government, on April 30, 1962, instituted criminal and civil contempt proceedings against him in the court of appeals. On July 15, 1963, Lynd was found to be in civil contempt (Pet. A4). The court of appeals ordered him

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For example, Negroes were given long and difficult passages of the Mississippi Constitution to read and interpret, while white applicants, if given the constitutional test at all, were given short and less difficult sections (Pet. A35-A36).

to register 43 named Negroes who had been illegally denied registration; to cease requiring Negroes to interpret sections of the Mississippi Constitution more difficult than those assigned to white applicants; to assign no sections for interpretation other than those given white applicants from November 1960 to March 5, 1962; to cease rejecting Negro applicants on the grounds of errors or omissions on their application forms if the applicants otherwise meet certain specified substantive qualifications of state law; and to notify Negro applicants of specific deficiencies on their application forms and afford them an opportunity to correct such errors.

On the same date the court of appeals, now having considered the appeal on the merits,[3] reversed and remanded the judgment of the district court denying the preliminary injunction (Pet. A1).

The petition for certiorari challenges both the judgment of civil contempt and the court of appeals' reversal of the district court's denial of the preliminary injunction.

ARGUMENT

In its present posture this case involves no questions that were not raised by or available to petitioners on their earlier attempt to seek review in this Court of the court of appeals' interlocutory orders. Challenges to the court of appeals' assumption of jurisdiction and to the propriety of its orders were made

[3] The appeal was submitted on a complete record and briefs. Oral argument was waived by all parties (Pet. A1, A13).

at that time. Certiorari was denied. 371 U.S. 893. The instant petition concerns identical or similar issues, all of which were correctly decided by the court of appeals, and none of which requires further review by this Court.

1. Petitioners assert again that the court of appeals lacked jurisdiction because the district court entered no appealable order. But the court of appeals correctly held in its earlier opinion that "the failure of the trial judge to grant the temporary injunction constituted an 'interlocutory order of the district court * * * refusing * * * an injunction.' Such order is appealable." 301 F. 2d 818, 822 (Pet. A37). A preliminary injunction runs only until the district court decides the merits of the case in granting or refusing a permanent injunction. By refusing to act after more than eight months had elapsed since the institution of the suit, the district court, in effect, held that it would grant no relief until procedures normally associated with requests for permanent injunction were completed. This course deprived the government of the right to a preliminary injunction, and hence was the equivalent of an express denial of such an injunction.

2. Petitioners repeat their contention that there was no official record before the court of appeals, and argue that this ousted the court of jurisdiction (Pet. 19-24). This argument can relate only to the judgment previously attacked unsuccessfully by petitioners in this Court, since it was only at the hearing of April 6, 1962 that the court of appeals had no official transcript of the proceedings in the district

court.[1] The certified official transcript was before the court in the contempt proceeding and during its consideration of the appeal on the merits. Consequently, the judgments which petitioners are now seeking to have reviewed were entered after appellate consideration of duly certified records.

3. Petitioners' contention that the court of appeals' injunction and contempt order were improper because they required petitioner Lynd to violate the Mississippi Constitution and the Mississippi Code (Pet. 24-30) are patently frivolous. Mississippi law does provide that an applicant for voting registration be able to write and interpret "any" section of the state constitution. However, this requirement obviously does not compel the voting registrar to select any particular provision of the constitution for examination purposes. By restricting the registrar's choice to those sections which have, in the past, been assigned to white applicants, the court of appeals was merely requiring equality in the administration of the standard; it was not compelling violations of Mississippi law.

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[1] As discussed in our Brief in Opposition to petitioners' previous petition for certiorari (No. 355, 1962 Term), the court of appeals did have before it an "unofficial" transcript prepared by court reporters who had been engaged by the government. Petitioners have failed to demonstrate that this transcript contained any material errors or inaccuracies. In light of the need for prompt action by the court of appeals, this procedure was surely sufficient to meet the requirements of Rule 75(j) of the Federal Rules of Civil Procedure. See Brief in Opposition, No. 355, 1962 Term, pp. 7-8.

Nor is there any merit to the additional claim that petitioner Lynd is required, by the terms of the civil contempt order, to violate other sections of the Mississippi Constitution and the Mississippi Code. Although Section 241-A of the Mississippi Constitution (Pet. A25) provides that voting applicants must demonstrate "good moral character," the court of appeals was fully justified, in light of the record before it, in disregarding such a vague standard and establishing objective criteria for registration in Forrest County so as to prevent circumvention of its order. Cf. *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.), affirmed, 336 U.S. 933. Similarly, § 3213 of the Mississippi Code, enacted *after* the April 1962 injunction entered by the court of appeals, which renders "mandatory and not directory" the previously existing statutory provisions requiring applicants to complete their applications correctly without assistance (Pet. A24), could be disregarded as an impermissible effort to "freeze" the electorate in its white mold. Cf. *Guinn* v. *United States*, 238 U.S. 347; *Lane* v. *Wilson*, 307 U.S. 268; *United States* v. *McElveen*, 180 F. Supp. 10 (E.D. La.), affirmed *sub nom. United States* v. *Thomas*, 362 U.S. 58; *United States* v. *Penton*, 212 F. Supp. 193 (M.D. Ala.); *United States* v. *Dogan*, 314 F. 2d 767 (C.A. 5). Moreover, whether this subsequent change of local law required an amendment of the outstanding orders of the court of appeals was a question which should have been presented by petitioners in that court on motions for modification or clarification. The issue cannot be raised by disobedience of the court de-

cree. See *Muller* v. *Henry*, 17 Fed. Cases 978, No. 9916; *Yanish* v. *Barber*, 211 F.2d 467, 470 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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